

DOCKET FILE COPY ORIGINAL

ORIGINAL

STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE RECEIVED

THREE EMPIRE STATE PLAZA, ALBANY, NY 12223-1350

PUBLIC SERVICE COMMISSION

JOHN F. O'MARA
Chairman



FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

JOHN C. CRARY
Secretary

SEP 18 1997

September 18, 1997

William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 10554

RE: CC Docket No. 97-137 - Application of Ameritech
Michigan Pursuant to Section 271 of the Communications
Act of 1934, as amended, To Provide In-Region,
InterLATA Services to Michigan - Petition for
Reconsideration

Dear Secretary Caton:

Enclosed for filing please find an original and eleven
(11) copies of the Petition for Reconsideration submitted by the
New York State Department of Public Service in the above-
captioned matter.

A copy of the petition is being provided to Ms. Cathy
Seidel of the Common Carrier Bureau and to the Commission's
document contractor, ITS. Also enclosed is a copy of our
petition on diskette in "read only" format.

Thank you.

Sincerely,

Lawrence G. Malone per DD

Lawrence G. Malone
General Counsel
New York State
Department of Public Service
3 Empire State Plaza
Albany, New York 12223

enc. 12

No. of Copies rec'd
List ABCDE

0411

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

ORIGINAL
RECEIVED

SEP 18 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Application of Ameritech Michigan) CC Docket No. 97-137
Pursuant to Section 271 of the)
Communications Act of 1934, as)
amended, To Provide In-Region,)
InterLATA Services to Michigan)

PETITION FOR RECONSIDERATION

SUBMITTED BY THE

NEW YORK STATE DEPARTMENT OF PUBLIC SERVICE

Dated: September 18, 1997
Albany, New York

RECEIVED

SEP 18 1997

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Application of Ameritech Michigan) CC Docket No. 97-137
Pursuant to Section 271 of the)
Communications Act of 1934, as)
amended, To Provide In-Region,)
InterLATA Services to Michigan)

PETITION FOR RECONSIDERATION

INTRODUCTION AND SUMMARY

Pursuant to 47 USCA 405 and 47 CFR 1.106, the New York State Department of Public Service (NYDPS) hereby requests that the Federal Communications Commission (Commission) reconsider the Memorandum Opinion and Order (Order) in the above-referenced proceeding, adopted August 19, 1997.

In denying Ameritech's application to provide interLATA service originating in Michigan, the Commission provided "guidance" on the checklist requirements that Ameritech "and the other BOCs" had to show to demonstrate full compliance with the checklist (Order ¶281). Specifically, the Order stated that a Bell Operating Company (BOC) could not be deemed in compliance with the pricing provisions of Section 271 unless the BOC demonstrated that prices for interconnection, unbundled elements and transport and termination were based on "TELRIC principles." (Order ¶¶ 289, 290).

While the NYDPS agrees with the Commission that opening local markets to competition is the *quid pro quo* for RBOC interLATA relief, the Commission has exceeded its jurisdiction by declaring

that Congress intended that there be national pricing rules. The Eighth Circuit unequivocally declared otherwise. Therefore, the Commission should reconsider its conclusion that Section 271 mandates TELRIC pricing pursuant to its Section 252(d) authority.

NYDPS takes issue with the Commission's decision insofar as the decision is ostensibly applicable not only to Ameritech but also to Bell Atlantic's entry into the interLATA market in New York. New York did not file comments on the Ameritech application because the Commission did not provide notice that the standards established in the Ameritech proceeding would directly apply to Bell Atlantic's application for interLATA entry in New York.

I. THE COMMISSION FAILED TO PUT THE STATE COMMISSIONS ON NOTICE THAT ITS DECISION IN THE AMERITECH ORDER WOULD BE GENERALLY APPLICABLE TO THE OTHER REGIONAL BELL OPERATING COMPANIES

On May 21, 1997, the Commission issued a Public Notice regarding Ameritech's application to provide interLATA service originating in Michigan. The Notice asked for comments specifically on the Ameritech application. The Notice did not include any mention that the standards established in the Ameritech Order would be applicable to Bell Atlantic or the other RBOCs. In effect, without ever stating that it intended to use the Ameritech application to set the standards, the Commission has attempted to establish a rule of general applicability that Section 271(c)(2)(B)(i), (ii) and (xiii)'s costing provisions require TELRIC prices. Therefore, the Commission's failure to provide notice that it intended to make general rules violates §553(b)(3) of the Administrative Procedure Act (APA).

The rulemaking provisions of the APA "were designed to assure fairness and mature consideration of rules of general application." National Labor Relations Board v. Wyman-Gordon Co., 394 U.S. 759, 764 (1964) Section 553(b)(3) specifically requires that a notice of proposed rulemaking include "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 USCA 553(b)(3) The Ameritech Notice did not do this.

II. THE EIGHTH CIRCUIT HAS REJECTED THE COMMISSION'S
AUTHORITY TO SET LOCAL PRICES

The Eighth Circuit has concluded that jurisdiction to set pricing standards was reserved to the states under Section 252(d) of the Communications Act. Iowa Utilities Board v. Federal Communications Comm'n, ___F.3d___, (slip opinion issued July 18, 1997), 1997 U.S. App. Lexis 18183. Notwithstanding that decision, the Commission declares that it retains authority to interpret the pricing standards of Section 252(d) as a result of its Section 271 authority.¹ If the Commission does not have jurisdiction under 252(d) to impose national pricing standards under the Eighth Circuit ruling, then it does not have that jurisdiction under Section 271, which expressly incorporates the Section 252(d)(1) rates in the competitive checklist.

Moreover, Section 271(d)(2)(B) requires the Commission "to consult" with a state commission to determine whether the BOC

¹ NYDPS has joined other states in petitioning the Eighth Circuit to enforce its decision. This petition for reconsideration is accordingly filed as a protective measure.

has complied with the checklist for provision of interLATA services specified in Section 271(c). On its face, the checklist requirement of Section 271(c)(2)(B)(1) requires the Commission to verify whether a BOC is providing interconnection in accordance with the pricing standards developed by state commissions. It does not, as decided in Ameritech, give the Commission the authority to block RBOC entry because a state commission fails to adopt TELRIC pricing. As the Eighth Circuit has found, the states have the authority to set the pricing rules under Sections 251 and 252. The Commission cannot do under Section 271 that which it cannot do under Sections 251 and 252.²

Respectfully submitted,

Lawrence G. Malone

Lawrence G. Malone
General Counsel
New York State
Department of Public Service
Three Empire State Plaza
Albany, New York 12223-1350
(518) 474-2510

Of Counsel
Penny Rubin

Date: September 18, 1997
Albany, New York

² Inasmuch as the FCC is without jurisdiction to set general rules of applicability regarding TELRIC in the Ameritech Order, NYDPS does not raise the issue of whether TELRIC is the appropriate standard.

CC Docket No. 97-137

In the Matter of

Application of Ameritech Michigan
Pursuant to Section 271 of the
Communications Act of 1934, as amended,
To Provide In-Region, InterLATA Services
to Michigan

Petition of New York State
Department of Public Service

CERTIFICATE OF SERVICE

I, Penny Rubin, hereby certify that an original and eleven (11) copies of the Petition for Reconsideration in the above-captioned proceeding were hand-delivered to William Caton, Acting Secretary to the Federal Communications Commission. In addition, copies were sent by First Class Mail, postage prepaid, to all parties on the attached service list.



Penny Rubin
Managing Attorney
Office of General Counsel
NYS Dept. of Public Service
Three Empire State Plaza
Albany, New York 12223-1350
(518) 474-4223

Dated: September 18, 1997
Albany, New York

James Lanni
Rhode Island Division
of Public Utilities
100 Orange Street
Providence RI 02903

Joel B. Shifman
Maine Public Utility Commission
State House Station 18
Augusta ME 04865

Charles F. Larken
Vermont Department of
Public Service
120 State Street
Montpelier VT 05602

Rita Barmen
Vermont Public Service Board
89 Main Street
Montpelier VT 05602

Keikki Leesment
New Jersey Board of
Public Utilities
2 Gateway Center
Newark NJ 07102

Veronica A. Smith
Deputy Chief Counsel
Pennsylvania Public Utility
Commission
P.O. Box 3265
Harrisburg PA 17105-3265

Mary J. Sisak
District of Columbia
Public Service Commission
Suite 800
450 Fifth Street
Washington DC 20001

Telecommunications Report
1333 H Street, N.W. - 11th Floor
West Tower
Washington DC 20005

International Transcription
Services, Inc.
2100 M Street, NW
Suite 140
Washington DC 20037

Brad Ramsay
NARUC
Interstate Commerce
Commission Bldg., Room 1102
12th & Constitution St., NW
Washington DC 20044

William Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW
Washington DC 20554

Richard Metzger
Common Carrier Bureau
Federal Communications Commission
1919 M Street, NW
Washington DC 20554

Camille Stonehill
State Telephone Regulation
Report
1101 King Street
Suite 444
Alexandria VA 22314

Alabama Public Service
Commission
1 Court Square
Suite 117
Montgomery AL 36104

Archie R. Hickerson
Tennessee Public Service
Commission
460 James Robertson Pky.
Nashville TN 37219

Sandy Ibaugh
Indiana Utility
Regulatory Commission
901 State Office Bldg.
Indianapolis IN 46204

Ronald Choura
Michigan Public
Service Commission
6545 Mercantile Way
Lansing MI 48910

Mary Street
Iowa Utilities Board
Lucas Building
5th Floor
Des Moines IA 50316

Gary Evenson
Wisconsin Public
Service Commission
P.O. Box 7854
Madison WI 53707

Gordon L. Persinger
Missouri Public Service
Commission
P.O. Box 360
Jefferson City MO 65102

Sam Loudenslager
Arkansas Public Service
Commission
1200 Center Street
P.O. Box C-400
Little Rock AR 72203

Maribeth D. Swapp
Deputy General Counsel
Oklahoma Corp. Commission
400 Jim Thorpe Building
Oklahoma City OK 73105

Marsha H. Smith
Idaho Public Utilities
Commission
Statehouse
Boise ID 83720

Edward Morrison
Oregon Public Utilities
Commission
Labor and Industries Bldg.
Room 330
Salem OR 97310

Mary Adu
Public Utilities Commission of the
State of California
505 Van Ness Avenue
San Francisco CA 94102

Rob Vandiver
General Counsel
Florida Public Service
Commission
101 East Gaines Street
Tallahassee FL 32301

Glenn Blackmon
Washington U&TC
1300 S. Evergreen Park Dr., S.W.
P.O. Box 47250
Olympia WA 98504-7250

Policy and Planning Division
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W. - Room 544
Washington DC 20554

Myra Karegianes
General Counsel
Illinois Commerce Commission
State of Illinois Building
160 No. LaSalle - Suite C-800
Chicago IL 60601-3104

Margie Hendrickson
Assistant Attorney General
Manager, Public Utilities Division
121 7th Place East, Suite 350
St. Paul MN 55101

Robin McHugh
Montana PSC
1701 Prospect Avenue
P.O. Box 202601
Helena MT 59620-2601

Cynthia Norwood
Virginia State Corp. Commission
P.O. Box 1197
Richmond VA 23201

Deonne Brunning
Nebraska PSC
1200 N. Street
Lincoln NE 68508

Cathy Seidel, Enforcement Division
Common Carrier Bureau
1919 M Street, N.W.
Washington DC 20554

Diane Munns
Iowa Utilities Board
Lucas State Office Building
Des Moines, IA 50319